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September 20, 2010

Case Law Update:

RE: Kaolin v. Blackshear; Court of Appeals of Georgia; No. A10A1216; decided September 15, 2010 (2010 WL 3565709 (Ga.App. 2010)).

Dear Friends:

The Georgia Court of Appeals recently entered a decision in the above-referenced case on September 15, 2010. The following is our summary of the decision and an explanation of the impact it will have for employers, insurers, and human resource professionals.* †

Impact of Decision

The most severe impact of this case is its potential for misuse and abuse by employee-claimants. This case implicitly (though not expressly) permits employees to wait until the 350 maximum weeks of benefits have expired before demanding reinstatement of TTD benefits retroactively on grounds that a prior unilateral conversion of benefits from TTD to TPD under O.C.G.A. § 34-9-104 and Board Rule 104 was inappropriate and.

The Court of Appeals focused entirely, in the above-referenced opinion, on reversing a “one bite at the apple” approach to the unilateral conversion of TTD to TPD benefits adopted by the Superior Court and administrative law judge (“ALJ”). Essentially, it reversed the Superior Court’s decision that Georgia employers may not

unilaterally convert (“104”) an injured employee’s benefits from TTD to TPD unless there has been a change in work “status.” The Court of Appeals, like the Appellate Division of the State Board of Workers’ Compensation (“Board”), found no legal support for such a requirement.

Unfortunately, in deciding this issue, the Court of Appeals did not comment on the employee’s 4-year delay in asserting his claim for reinstatement of TTD benefits. This leaves Georgia employers and insurers in a state of perpetual uncertainty regarding every unilateral conversion made not only after this decision, but before it as well. Potentially, a windfall has been granted by implication to every injured employee whose benefits have been converted from TTD to TPD benefits unilaterally (i.e. without a hearing). While the Court of

Appeals did not expressly rule that such delays are permissible, neither did it preclude the employee in this case from obtaining a recommencement of TTD benefits more than 4 years after the conversion.

Case Background

It was undisputed in this case that: (1) Employee J.W. Blackshear worked for Employer Kaolin; (2) in the course of his employment on May 24, 2001, Blackshear injured both of his hands; (3) on June 11, 2001, the Employee's authorized treating physician ("ATP") Dr. Gary Godlewski, returned the Employee to light duty work with restrictions; (4) Dr. Godlewski referred the Employee to an orthopedist, Dr. Timothy Stapleton; and (5) the Employer missed its opportunity to convert the Employee's TTD benefits to TPD benefits at that time. The dispute in this case arose, however, when the ALJ retroactively denied the Employer a second opportunity ("bite at the apple") to unilaterally convert the Employee from TTD to TPD benefits.

The Employer obtained a second light-duty work release from Dr. Stapleton that was apparently dated December 31, 2002 and then planned to unilaterally convert the Employee's TTD benefits to TPD benefits as of December 31, 2003. Much was made in this case of the fact that the December 2002 work release was expressly based on a determination of work capacity made in August of 2002, due to the legal requirement that the Employer of the intent to convert within 60 days of the light-duty work release.

First, it is important to note that, on January 14, 2003, the Employer did notify the Employee of its intent to unilaterally convert the Employee's benefits, effective December 31, 2003 (the actual reduction in benefits occurred, however, did not occur until January of 2004).

This notice would have been rendered within 14 days of the December 31, 2002 work release, well *before* the 60-day deadline expired; however, the Employee argued that, because the December 31, 2002 work release was a mere restatement of an August 2002 examination/determination (the precise date was not given but the opinion implies an FCE was performed at that time). If the Employee's argument was sound, and presuming an August 31, 2002 light-duty determination, the Employer's notice would have been given 136 days from the date of that light-duty determination, well *after* the 60-day deadline. The Employee's indemnity benefits were terminated on February 8, 2008 ..., nearly a year sooner due to this conversion.

This dispute concerning which date actually served as the date of light-duty "determination" for purposes of deciding whether 60 days or more notice was given seems to have been the entire focus of the parties and all reviewing courts. Perhaps the Court of Appeals was distracted by the arguments pertaining to this dispute, or perhaps the Employer never objected on grounds of timeliness, but the opinion does not discuss expressly the propriety of permitting the Employee's TTD benefits to be reinstated more than 4 years after they were suspended and converted to TPD benefits. Nevertheless, this was the relief requested by the Employee.

Employee Blackshear did not demand a reinstatement of TTD benefits until *October of 2008*, arguing that he never received a valid notice under O.C.G.A. § 34-9-104 and Board Rule 104. In support of this argument, the Employee contended that the June 11, 2001 and December 2003 work releases were substantially the same and that a *change in work status* would be required before a new 60-day period would commence entitling the Employer to unilaterally convert his benefits. The Employer, of course, argued that the notice was sufficient, that the releases were not the same, and that a change in work status was not required as a prerequisite to the commencement of a new 60-day period.

Decision/Ruling

The ALJ, the Appellate Division, the Superior Court, and the Court of Appeals all agreed with the Employee that notice was insufficient in this case to permit the unilateral conversion from TTD to TPD benefits. Again, the extremely late hour of the Employee's request for reinstatement was, from the face of the appeal, was neither debated nor discussed, and it serves as no part of the Court of Appeals' ruling in this case (either directly or in passing). Perhaps, had this point been raised and debated, the opinion might have been resolved differently. Such is not the case, however, and the Court of Appeals affirmed the recommencement, reversing only a portion of the Superior Court's decision.

The portion of the Superior Court's decision that was reversed did not save the Employer in this case from recommencement of TTD benefits, but it does merit discussion. This partial reversal does provide some

protection for employers and insurers seeking to unilaterally convert and employee's benefits from TTD to TPD. The Court of Appeals reversed the Superior Court's reversal of the Appellate Division's reversal of that portion of the ALJ's decision, requiring a change in work "status" as a prerequisite to the commencement of a new 60-day period during which an employer/insurer may unilaterally suspend an employee's benefits after such an employer/insurer fails to succeed in doing so the first time a light-duty work release is rendered.

What this means, in short, is that the Court of Appeals affirmed the Appellate Division's original ruling that employers are not limited to "one bite at the apple" when attempting to unilaterally convert an injured employee's TTD to TPD benefits. Employers may rely on any *current* "determination" of light-duty work capacity by the ATP to justify such a conversion within a new 60-day period, regardless of whether there has been a change in work "status" since the first or a prior light-duty work release.

The Court of Appeals specifically adopted the following reasoning of the Appellate Division as its own: "*The notice is invalid [in this case], not because it is similar to a previous notice, but because it was issued more than 60 days **from the time the restrictions were 'determined'** (as opposed to merely articulated, recorded, or affirmed).*" Note that the key term in this reasoning is the word "determined." The Court of Appeals does not affirmatively state its definition for what is "determined," but it does state what the term does not include: mere articulation, recordings, or

affirmations of prior light-duty releases.

Clearly, however, the Court of Appeals has declined to consider or rule on the issue of whether the Employee's claim for reinstatement of TTD benefits was *timely* brought. There are only 3 possible explanations for this: (1) the Court of Appeals did not believe such an argument was worthy of consideration; (2) such an argument was made to the Court of Appeals but was not properly preserved for consideration on appeal and therefore disregarded; or (3) no such argument was made for the Court of Appeals to consider.

Of these three possibilities, the first seems highly unlikely in light of other established precedents (more on this in a moment) and the extreme length of the Employee's delay (4 or more years) in asserting the claim for reinstatement. The second seems unlikely as well, given that the Court of Appeals tends to affirmatively state in opinions when it declines to rule on an argument due to issues of ripeness, such as the failure to preserve the argument by raising it at trial and in the course of inferior appeals. That leaves the third possibility as the most likely explanation: the argument was not made for the Court of Appeals to consider.

Nevertheless, from the 4 corners of the opinion, there is no way to be certain, and this glaring oversight or omission, will certainly have a detrimental effect for employers and insurers until either the Georgia Supreme Court addresses this matter on appeal, or a future litigation eventually brings this issue to the appellate courts again for explanation/resolution.

Rationale

- ❖ The Georgia Court of Appeals reviews issues concerning the application and interpretation of the law to undisputed facts *de novo*, which means they do not review the lower courts for legal error but interpret/apply the laws themselves anew, as though for the first time.
- ❖ O.C.G.A. § 34-9-104(a)(2) does permit employers to unilaterally suspend TTD benefits and commence TPD benefits within 60 days of a light-duty work release or return to work with restrictions, with certain prerequisites.
- ❖ Board Rule 104, as a prerequisite to the foregoing conversion, requires employers to send the appropriate Board Form (WC-104) along with a copy of the medical record containing the work release to the injured employee no later than 60 days following the work release, which must be determined by the ATP.
- ❖ A current medical record merely restating restrictions determined more than 60 days earlier is insufficient to satisfy the notice requirement and will not permit the unilateral conversion of benefits ("104'ing").
- ❖ The Superior Court in this case erred, however, in finding that a change in work "status" was required for a unilateral conversion, as there is no basis in law for requiring a change in "status" as a prerequisite to unilateral conversion, so long as the claimant has some light or modified work capacity.

- ❖ The Court of Appeals, in this case, has affirmatively ruled that only notice and a truly current *determination* (implicitly defined as a communication of work restrictions following a recent examination) of light-duty work capacity were required to support a unilateral conversion subsequent to the first light-duty release.

What this Means for Employers

- ❖ A unilateral conversion (i.e. one a conversion without a hearing) under O.C.G.A. § 34-9-104(a)(2) is a highly complex legal procedure not to be lightly undertaken.
- ❖ Nevertheless, employers and insurers may, as before, unilaterally convert TTD to TPD benefits following the first light-duty work release issued by the ATP following the initial disabling injury or illness by provided proper notice on a Board Form 104 to the employee within 60 days and attaching thereto a copy of that first light-duty work release issued by the ATP.
- ❖ However, where that first “bite at the apple is missed,” and a WC-104 is not filed within 60 days of the first light-duty release after the disabling injury/illness in question, **additional precautions should be taken before attempting a conversion using a second or subsequent light-duty work release.**
- ❖ In order to properly convert benefits pursuant to a second or subsequent light-duty work release, an employer/insurer must make certain that the work-release “determination” to be relied upon is not merely an “articulation, restatement, or affirmation” of a *prior* “determination” of light-duty capacity; essentially, the physician must be making a current “determination” that the employee in question is capable of working in a light-duty capacity.
- ❖ The “determination” need not represent a change in work “status,” and may be identical in the restrictions issued, but it may not rely upon an older “determination,” and must be current; moreover, though the term “determination” is not expressly defined by the Court of Appeals, it implicitly requires a current examination performed by the ATP, and, for that reason we have always in the past and continue to recommend currently that every light-duty work release attached to a WC-104 is based on a current examination by the ATP.
- ❖ The biggest issue, moving forward, is the potential that claimants and their employees will misrepresent this case, citing it as precedent enabling them to “sit on their rights” by waiting until the payment of their maximum 350 weeks of converted TPD benefits prior to bringing a claim for reinstatement of TTD benefits on grounds that the conversion was improper; while that was the result in this case, the Court of Appeals did not pass judgment on the timeliness of the Employee’s claim for reinstatement, one way or the other.
- ❖ Other authority suggests the Employee’s claim in this case should have been

denied as untimely: employees and providers are barred by O.C.G.A. § 34-9-203(c)(4) from collecting sums for mileage, goods, and services after the expiration of 1 year from the date of service/rendition; and O.C.G.A. § 34-9-245 precludes employers and insurers from asserting a claim for overpayment of income benefits more than 2 years after the date of such overpayment.

- ❖ Those precedents and others strongly imply that claimants should be precluded from asserting a claim for reinstatement of TTD benefits 4 years after an allegedly improper unilateral conversion to TPD benefits under O.C.G.A. § 34-9-104 and Board Rule 104.

SUGGESTED PRECAUTIONS

There are no obvious solutions in addressing the uncertainty created by this decision of the Court of Appeals, particularly as it pertains to past conversions that may now be attacked as a result of this holding; however, there are a few preventative measures that can be taken with respect to *future* conversions.

- ❖ First, employers and insurers alike would be well-advised to make certain, when completing a Board Form WC-104, that the supporting medical record is, ideally, the first light-duty release following the disabling injury/illness.
- ❖ Second, where it is clear that a light-duty work release is not the first release, it would be wise to ensure that the physician is making a current “determination” of work capacity.
- ❖ The simplest way to ensure that a “determination” of light-duty work capacity is current would be to request a statement to that effect from the physician in the way of a narrative or questionnaire (e.g., “this is my current opinion, based on my recent examination of the employee’s person and records as of <insert date>”).
- ❖ Lastly, employers and insurers are advised that, based on the uncertainties of this decision, older claims and files in which there was a unilateral conversion from TTD to TPD benefits may now have exposure for additional TTD benefits previously unpaid, particularly if those claims were not resolved by settlement.

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